(1) FILED

No. 03 844 DEC 8 2003

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IN THE

Supreme Court of the United States

Kansas Department of Human Resources

Petitioner

v.

Jill Crumpacker

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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I.

The Court's Reliance on the Congressional Record Finding Discrimination in Employment During Enactment of the 1972 Amendments Is Not Sufficient to Support a Finding That Congress Identified a Pattern of Retaliation Which Would Support a Valid Exercise of Congress' Section 5 Powers.

II.

The Lower Court Decisions Applying the Exclusions of 42 U.S.C. 2000e(f) Exceed the Plain Language of the Section and Are an Impermissible Infringement upon the State's Sovereignty as Guaranteed by the Tenth and Eleventh Amendments to the United States Constitution.

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OPINIONS BELOW

The August 8, 2003, decision of the United States Court of Appeals for the Tenth Circuit is reported at 338 F.3d 1163, and is included in the petition appendix. The District Court opinion is not published, and is included in the appendix.

JURISDICTION

This Court's jurisdiction to review the judgement of the Tenth Circuit is invoked pursuant to 28 U.S.C. 1254. The Tenth Circuit issued its decision in this case on August 8, 2003. Defendants filed their petition for rehearing *en banc* August 22, 2003. The Tenth Circuit issued its order denying rehearing *en banc* on September 8, 2003. This petition is filed within 90 days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by

it to the States, are reserved to the States respectively, or to the people.

The relevant provisions of the Fourteenth Amendment to the United States Constitution provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT

1. *Nature of the Suit.* This is an employment law case brought by Plaintiff, a former Director of the Kansas Department of Human Resources Employment and Training Division, a position appointed by the Secretary of Human Resources with the approval of the Governor. Plaintiff alleges gender based discrimination and retaliation claims under Title VII. The State of Kansas moved for summary judgement on the basis that plaintiff was not an employee as defined under Title VII, and thus her claim was precluded. At oral arguments the State of Kansas argued

that Congress did not validly abrogate the State's Eleventh Amendment immunity as relates to the retaliation provisions of Title VII. The District Court granted summary judgement as to one of the retaliation claims, but found that Plaintiff was an employee under Title VII. The District court did not address the Eleventh Amendment abrogation argument.

2. *The Lower Court Proceedings*. The State of Kansas filed for summary judgement on the basis that Plaintiff was not an employee as defined by Title VII, and that the State was immune as to Plaintiff's claims for retaliation as Congress had not validly abrogated the States sovereign immunity when it applied the retaliation provisions of Title VII to the States.

a. *The District Court*: The District Court dismissed one of the retaliation claims as a matter of law. The District Court however denied summary judgement as to Plaintiff's status as an employee, finding that a policy maker who is not appointed by an elected official, and whose appointment is only subject to the approval of the elected official does not fall within the exclusions of 42 U.S.C. 2000e(f). The District Court did not address the 11th Amendment argument as to the retaliation claim.

b. *The Tenth Circuit*: The State of Kansas took interlocutory appeal of the Eleventh Amendment immunity issue and other issues raised in its motion for summary judgement under the collateral order doctrine. The Tenth Circuit affirmed the District Court's order.

(1) *Eleventh Amendment Immunity*: The State of Kansas argued that when Congress enacted the 1972 amendments to Title VII, applying its provisions to the States, there was no finding in the legislative record that there was a pattern or practice of the States in retaliating against members of a protected class. The Tenth Circuit

declined to distinguish between discrimination in employment and retaliation, and found that the legislative record before Congress when it enacted the 1972 amendments to Title VII indicated that Congress identified a pattern of employment discrimination based on gender by the States.

(2) *Plaintiff's status as an employee*: The State of Kansas argued that Plaintiff's status as a policy maker whose appointment was subject to the approval of the Governor, excluded her from coverage of Title VII. Further, that under *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991), the State has the right to determine the duties and status of its officials, and when it is unclear whether Congress intended to exclude those positions from the definition of policy maker, the principals of the State's sovereignty compel a finding that they are excluded from coverage under 42 U.S.C. 2000e(f). The Tenth Circuit declined to give such an interpretation to *Gregory* and relied on *Fitzpatrick v. Bitzer* 427 U.S. 445, 449 N.2 (1976) to find that Congress had expressed a clear intent to abrogate the States Eleventh Amendment immunity from Title VII claims, and therefore it was unnecessary to address Plaintiff's status as an employee.

REASONS FOR GRANTING THE WRIT

I. The Court's Reliance on the Congressional Record Finding Discrimination in Employment During Enactment of the 1972 Amendments Is Not Sufficient to Support a Finding That Congress Identified a Pattern of Retaliation Which Would Support a Valid Exercise of Congress' Section 5 Powers.

The retaliation provisions of Title VII do not validly abrogate the State's Eleventh Amendment immunity as the

provision does not remedy any unconstitutional conduct in a congruent and proportional manner.

This dispute focuses on Congress' authority to regulate employment practices of the States, and particularly whether Congress may authorize suits by private individuals for money damages against a sovereign State for retaliation under Title VII.

Under the American system of dual sovereignty, Congress' authority to apply its constitutional powers upon the States is limited by both the Tenth and Eleventh Amendments. *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991).

The Eleventh Amendment, in particular guarantees that Congress cannot subject the States to private suits for money damages except as part of a scheme enacted under Section 5 of the Fourteenth Amendment to remedy unconstitutional conduct. *U.S. Constitution amend. XI; U.S. Constitution amend. XIV; Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 71 - 73 (1996).

When asserting its Section 5 powers, Congress can only enact those remedies that are congruent and proportional. See *City of Bourne v. Flores,* 521 U.S. 507, 520 (1997).

Kansas would respectfully submit that the Court's reliance on the pattern of employment discrimination found when the 1972 amendments to The Civil Rights Act of 1964 were enacted, is too broad of an interpretation to find that Congress had a sufficient legislative record in 1972 to apply the retaliation provisions of Title VII to the States, thus allowing abrogation the State's sovereign immunity as guaranteed by the Eleventh Amendment, and is inconsistent

with this Court's decisions regarding abrogation of a State's Eleventh Amendment protections.

The Framers of the Constitution's intent to continue the sovereign immunity of the States is apparent through the enactment of the Eleventh Amendment. In recent years this Court has reviewed the Eleventh Amendment protections, and Congress' power to abrogate that protection. While Kansas respectfully acknowledges that this Court has indicated the legislative record of the 1972 amendments support a valid application of Title VII to the States in employment discrimination cases, we respectfully submit that there is no such record as to retaliation by the States.

***Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)**

Fitzpatrick, as recently as this Court's determination in *Nevada Department of Human Resources v. Hibbs*, 123 S.Ct. 1972, 1978, has been held as authority that this Court has determined that Congress validly abrogated State sovereign immunity in Title VII.. *Id.*

Fitzpatrick however did not reach the issue of whether the substantive provisions were a proper exercise of Congressional authority. The issue was not before this Court and was addressed only in a footnote that the State did not contend that the substantive provisions of Title VII as applied to the case were not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment. *See* 427 U.S. at 456 n.11. The retaliation provision at issue here was not addressed. Additionally, *Fitzpatrick*, which was decided in 1976, was prior to the three prong test of *Board of Trustees of University of Alabama v. Garrett* 531 U.S. 356 (2001) .

***Board of Trustees of University of Alabama v. Garrett* 531 U.S. 356 (2001)**

To have a valid Eleventh Amendment abrogation, Congress' §5 enforcement authority under the Fourteenth Amendment can be appropriately exercised *only* in response to *State* transgressions, and not constitutional violations by units of local governments. *Board of Trustees of University of Alabama v. Garrett* 531 U.S. 356 (2001). In order to authorize private individuals to recover money damages against the States, Congress must have found a history and *pattern* of unconstitutional discrimination by the States, which violates the Fourteenth Amendment. *Id.* Legislation under the enforcement section of the Fourteenth Amendment, reaching beyond the scope of the Amendment's actual § 1 guarantees, must exhibit both congruence and proportionality between the constitutional injury to be prevented or remedied and the means adopted to that end. *Id.*

The retaliation provision of Title VII is found in a provision categorized as "Other unlawful employment practices," and states:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any

> individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. 42 U.S.C. 2000e-3(a).

There is no requirement in Section 2000e-3(a) that a retaliation claim be based upon gender discrimination. Nor is it required that a gender based discrimination occur, in order to maintain a separate claim for retaliation. *Love v. RE/MAX of Am. Inc.*, 738 F.3d 383, 385 (10th Cir. 1984). Under the participation clause of Section 2000e-3(a), an individual who testified as a witness, may maintain a retaliation claim, even though the retaliation has nothing to do with that individual's gender.

Kansas would respectfully submit that since a retaliation claim may stand on its own, without consideration of gender discrimination, and applying the principles of *Garrett,* a finding of employment discrimination in general, does not equate to a finding of a history and pattern of retaliation.

In *Garrett*, this Court outlined a three-part test to determine whether Congress has properly abrogated the States Eleventh Amendment immunity. The first step is to identify the scope of the constitutional right in question by examining prior decisions under the Equal Protection Clause dealing with the issue. *Garrett*, 531 U.S. at 365. Second, the court must examine whether Congress adequately identified a history and pattern of unconstitutional employment discrimination by the States.

Id. at 368. Third, the Court must determine whether the remedy chosen by Congress is both congruent and proportional to that constitutional injury. *Id.* at 372.

Application of those steps illustrates that Congress did not properly abrogate the States Eleventh Amendment immunity with respect to the retaliation clause in Title VII. Because Congress wholly failed to identify a history and pattern of unconstitutional retaliation by States, the remedy of private suits cannot be congruent and proportional to resolving an unidentified constitutional injury.

The 1972 amendments to the Civil Rights Act of 1964 included a provision adding Title VII coverage to state and local governments. However, nothing in the amendments themselves nor in the legislative history specifically addressed retaliation. The amendment itself was to the definition sections, thus bringing most state and local governmental employers and employees within all prohibitions of Title VII; without addressing the need for particular prohibitions of Title VII in regard to States.

In his statement introducing the bill on the Senate Floor, Senator Williams noted the contrasting employment rates for Negroes, Spanish-speaking Americans and women with those of white males; but stated nothing whatsoever about any problem with or need to remedy retaliation. Cong. Rec. (1/19/72) at 294-296.

Likewise, in his statement introducing HR 1746 on the floor of the House for debate, Rep. Perkins emphasized the employment percentage disparities between black and white Americans; noted a low percentage of women in the workforce and disparity in their pay. Cong. Rec. (9/15/71) at 31959-31960. His focus was on access to job

opportunities. He stated nothing about any problem with or need to remedy retaliation. *Id.* at 31961.

During Senate floor debate, a vote was taken on an amendment to strip language that included states and political subdivisions, from the Senate bill. That amendment, offered by Senator Ervin, failed by a vote of 16 to 59. Cong. Rec. (1/28/72) at 1677-1679, and Cong. Rec. (1/31/72) at 1810-1841. Again, there was no discussion about any problem with or need to remedy retaliation. *Id. See also* Cong. Rec. (1/31/72) at 1815, statement by Sen. Williams.

The House debate focused largely on whether an administrative agency or the courts offered the best enforcement mechanism and whether the EEOC was the best agency to deal with the perceived employment opportunity problem. Cong. Rec. (9/15/71) at 31958-31985, 32088-32111. But, again, there was no discussion about any problem with or need to remedy retaliation.

The statistics utilized by proponents of the language to add Title VII coverage for state and local governments focused on the statistics to show that minorities and women made up relatively small proportions of the workforces of governments. Cong. Rec. (1/19/72) at 294-295 (statement by Sen. Williams); Cong. Rec. (1/31/72) at 1837 (statement of Sen. Taft summarizing report of U.S. Commission on Civil Rights); *Id.* at 1815 (statement by Sen. Williams); Cong. Rec. (2/22/72) at 4930-4931 (statement by Sen. Cranston); Cong. Rec. (9/16/71) at 32101-2 (statement by Rep. Badillo); *Id.* at 32096 (statement by Rep. Abzug). None of these discussions mentioned retaliation, or any problem with or need to remedy retaliation.

The House bill, HR 1746, passed on September 16, 1971,

before floor debate on the Senate bill began. Cong. Rec. (9/16/71) at 32113. The House had previously voted to substitute a bill co-sponsored by Reps. Erlenborn and Mazzoli for the committee bill. *Id.* at 32111. This bill did not contain the committee language extending coverage to state and local government employees. *Id.* at 31971 (statement by Rep. Mazzoli). President Nixon's position, supporting inclusion of state and local government coverage, was articulated in his State of the Union message; and also figured in the debate. Cong. Rec. (1/31/72) at 1837 (statement of Sen. Javits). However, that support specifically stated the President supported giving the EEOC jurisdiction over the *hiring practices* of state and local governments. *Id.* (emphasis added). Again, there was no discussion about any problem with or need to remedy retaliation.

The House-Senate Conference Committee reported a compromise bill that included the Senate language deleting most coverage exemptions for state and local government employees. 1972 *United States Code Congressional and Administrative News,* Vol. 2 at 2137-2186. In a section titled "Need for the Bill," the Conference Report lamented that the goal of equal employment opportunity for all citizens had not been met by the Civil Rights Act of 1964. *Id.* at 2139. The Report goes on to note employment and salary disparities of nonwhites and women. *Id.* at 2140. Again, there was no discussion about any problem with or need to remedy retaliation.

The Conference Report also included a section on State and Local Government Employees. *Id.* at 2152. This section identified the types of discriminatory behavior believed exhibited by state and local governments; citing a federal Commission on Civil Rights report. Notably, again, there was no discussion about any problem with or need to remedy

retaliation.

In short, neither the 1972 amendments to Title VII, nor the Congressional debates nor the Conference Report contain any discussion about any problem with or need to remedy retaliation by the States. There was no mention of retaliation by the States. Thus there was no showing of the required "history and pattern" of unconstitutional behavior by the States in regard to retaliation.

Accordingly, the second step in the analysis in itself illustrates that Congress did not make the necessary findings in order to abrogate Eleventh Amendment immunity with respect to the Title VII retaliation provision. Congress failed to expressly find the existence of an actual constitutional injury by the States that would be redressed via applying the retaliation provision to the States.

With respect to retaliation issues, as the Supreme Court has pointed out, "had Congress truly understood the information before it as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings." *Garrett,* 531 U.S. at 371.

There was no such mention regarding retaliation even being a problem, and certainly not any unconstitutional history, nor any pervasive and persistent pattern. The evidence provided in the legislative history does not support a conclusion that there was an unconstitutional history and pattern by States with respect to retaliation.

The abrogation conclusion also fails the third analytical step. The remedy passed by Congress--applying the preexisting Title VII retaliation provision to the States--cannot be

congruent and proportional. This is because Congress did not identify any constitutional injury by the States as to which the court may measure its congruency and proportionality. Because there was no such articulated constitutional injury by the States with respect to the retaliation provision of Title VII, Congress did not abrogate the States Eleventh Amendment immunity with respect to the retaliation provision of Title VII.

II. The Lower Court Decisions Applying the Exclusions of 42 U.S.C. 2000e(f) Exceed the Plain Language of the Section and Are an Impermissible Infringement upon the State's Sovereignty as Guaranteed by the Tenth and Eleventh Amendments to the United States Constitution.

42 U.S.C. 2000e(f)

The exclusions provided in 42 U.S.C. 2000e(f) provide:

> any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

The current standard.

The lower courts that have discussed this exemption, particularly the policy making exemption, have impermissibly narrowed the exception by systematically excluding from this class those on the policy making level whose appointments are made with the "approval" of the elected official, without regard as to the actual duties and functions of the position, i.e. whether it is at the policy making level , and whether they directly serve the elected official in a policy making capacity. See *Anderson v. City of Albuquerque,* 690 F.2d 786, (10th Cir. 1982, appointment by chief administrative officer with approval of mayor, not an appointed by an elected official; *Wanner v. State of Kansas,* 766 F. Supp. 1005, (D. Kan. 1991), ADEA, appointment of Assistant Director by Cabinet member of Governor, not an appointment by an elected official; *Tranello v. Frey*, 962 F.2d 244 (2nd Cir.), cert. Denied, 506 U.S. 1034 (1992), appointment of a Deputy County Attorney by the County Attorney, subject to the approval of the County Executive, not an appointment by an elected official; *O'Neill v. Indiana Commission of Public Records*, 149 F.Supp. 2d 582, (S.D. Ind. 2001).

In each of these decisions, the lower court's have systematically looked only to whether the policymaker was a "direct" appointee, giving no consideration to whether the position was at a policy making level as defined by state law. This is an impermissible intrusion under the Tenth Amendment with Eleventh Amendment implications upon the State's sovereignty.

Tenth Amendment implications.

The Tenth Amendment to the U.S. Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), reviewing the identical exclusions under the ADEA, examined Congress' power to encroach upon the State's right to define the powers and qualifications of its officials;

> Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor v. Beckham*, 178 U.S. 548, 570-571, 20 S.Ct. 890, 898, 44 L.Ed. 1187 (1900). See also *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161, 12 S.Ct. 375, 381-382, 36 L.Ed. 103 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen"). *Gregory* at 460.

The lower court decisions which apply a rigid "direct" appointment test rather than addressing the applicable state law to determine if the individual is at a policy making level impose too restrictive of a standard and one which exceeds the intent of Congress thus restricting the States' right to

establish the duties and functions of their high level officials.

Eleventh Amendment implications.

The Court below summarily dismissed the State's Eleventh Amendment contentions on this issue, on the basis that the exclusion only goes to whether the individual is covered by Title VII, and not the State's immunity. The Court's ruling is demonstrative of the Eleventh Amendment implications.

The Eleventh Amendment prohibits individual suits for money damages against the States. If the lower court's decision that Congress validly abrogated the State's Eleventh Amendment immunity stands, then Title VII becomes one of the few exceptions to the State's Eleventh Amendment immunity.

Within Title VII however certain persons are excluded from Title VII's coverage, (42 U.S.C. 2000e(f)), and therefore without the vehicle of Title VII, the Eleventh Amendment bars their monetary claims against the State.

If however, the lower courts are allowed to continue to apply the incorrect standard as to who is excluded under 42 U.S.C. 2000e(f), and particularly the policy making level, this broadens the class of individuals who are within the coverage of Title VII, thus entitling them to maintain private actions for monetary damages against the State. This allows abrogation of the State's Eleventh Amendment immunity by judicial decision, and allows a greater class to bring suit than intended by Congress.

The correct standard.

Kansas would respectfully submit that the exclusions of 42 U.S.C. 2000e(f), as enacted and intended by Congress, are sufficiently broad to exclude from Title VII coverage, those at the policy making level of state government who, as in the present case, are appointed by a cabinet secretary subject to the Governor's approval. In conjunction with the provisions of 42 U.S.C. 2000e-16c it avoids the Tenth and Eleventh Amendment infringement of the current standard.

42 U.S.C. 2000e-16c.

The standard sought by the State of Kansas is consistent with not only the plain language of 42 U.S.C. 2000e(f), but finds support in 42 U.S.C. 2000e-16c, which provides:

> (a) Application
>
> The rights, protections, and remedies provided pursuant to section 2000e-16b of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof - -
>
> (1) to be a member of the elected officials personal staff;
>
> (2) to serve the elected official on the policy making level; or
>
> (3) to serve the elected official as an

> immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Individuals who are excluded from Title VII coverage by the exclusions of 42 U.S.C. 2000e(f) are not without remedy for discriminatory conduct. Those who are exempted from Title VII coverage are provided comparable coverage under § 2000e-16c, coverage of previously exempt State employees.

42 U.S.C. 2000e(f) was last amended in 1991 (Pub. L. 102-66 § 109(a). Adding a provision relating to employment in a foreign country.) The exclusions under consideration however are part of the original 1972 amendments. 41 U.S.C. 2000e-16c was last amended in 1995, and is thus the latest expression of legislative intent.

42 U.S.C. 2000e-16c by its plain reading "Coverage of previously exempt State employees", was amended to give a right of action to those excluded by 42 U.S.C. 2000e(f), thus the clarification of who is covered by 42 U.S.C. 2000e-16c would describe those excluded by 42 U.S.C. 2000e(f).

Section 2000e-16c describes those within its coverage as "any individual chosen or appointed . . . to serve the elected official on the policy making level; or . . . to serve the elected official as an immediate advisor . . ." (*Emphasis added*).

Applying plain language to the statute, there is a distinction between chosen and appointed. As long as the elected official has final appointment authority, an individual who is selected by a direct appointee of the elected official,

subject to the approval of the elected official, is in fact an appointee of the elected official.

In addition, again applying the plain language of the statute, the key is that the individual "serve" the elected official at the policy making level or be an immediate advisor.

There is simply no statutory authority in either Section 2000e(f) or 2000e-16c to support the present standard used by the lower courts to determine whether an individual falls within the exclusions of 42 U.S.C. 2000e(f). The present standard imposed by the lower courts intrudes upon the State's rights under the Tenth Amendment to the United States Constitution to determine the qualifications of their own officers and officials. This Court should exercise this opportunity to correct this impermissible extension of Congressional interference.

This Court should accept this case as an excellent vehicle to clarify the correct standard in applying the exclusions of 42 U.S.C. 2000e(f) to a Title VII claim.

The facts of the present case present an excellent opportunity for this Court to set the proper standard in determining the applicability of the exclusions of 42 U.S.C. 2000e(f) to a Title VII claim brought by a state political appointee.

Ms. Crumpacker was an unclassified political appointee. She described her employment in the resume she prepared soon after her appointment was terminated, listing the entire period 1994-1998 as "Graves Administration (Kansas Governor)." Ms. Crumpacker described this as:

> For the first two sessions of the Graves

> Administration, I promoted the Governor's agenda . . . Following a very successful second legislative session, I was offered a promotional appointment over the remainder of the term to restructure and revitalize one of the four divisions within the state labor department. . .

Ms. Crumpacker described the remainder of her Graves Administration employment as:

> member of senior executive team for the state's labor department overseeing one of four Agency divisions. Administered state and federal workforce training programs through nearly 200 people . . . with an annual budget of nearly $30 million . . . Human resource management issues and employee relations were at the forefront, including tracking and training on employment law as applied in the workplace, grievance resolution, and drafting of priority outcomes. Political appointment ended in September 1998.

Ms. Crumpacker's last assignment with the Graves Administration was as the Director of the Division of Employment and Training of the Kansas Department of Human Resources (KDHR). The terms and conditions of her appointment and her job duties are set by Kansas law.

Most positions in the Kansas state employment require nothing of the Governor. The unclassified (at will, non-civil service protected) positions require the Governor's "approval" as to compensation. K.S.A. 75-2935b.

Ms. Crumpacker's Division Director position explicitly, by statute, required more than the ordinary unclassified position's approval of pay. It required actual "consent" of the Governor to the appointment itself, without which there could be no appointment at all. K.S.A. 75-5702.

Although the entire KDHR was administered by the Secretary of Human Resources, a cabinet level position, the freedom of appointment for the directors of KDHR's four Divisions was limited to a "pool" of names given to the Secretary from the Governor's office.

The Governor and his wife interviewed Ms. Crumpacker at the time she was first employed within the Graves Administration; Ms. Crumpacker in her letter of application acknowledged that it was the Governor's Appointments Secretary who advised her there was to be an opening for the Division Director position. It was the Governor's Appointments Secretary who suggested Ms. Crumpacker apply for this "promotional" appointment. The Governor's office and his Appointments Secretary had pre-screened her and approved her for the position; and the consent of the Governor was also specifically sought in writing by the Secretary.

KDHR Secretary Franklin had no power to hire Ms. Crumpacker without the Governor's knowledge and consent. Secretary Franklin requested permission to appoint Ms. Crumpacker as the unclassified Division Director of Employment and Training. Ms. Crumpacker led one of the largest divisions in state government.

When Secretary Franklin was considering sending Ms. Crumpacker to an executive learning course, he requested permission to do so from the Governor's office. Franklin

even visited with the Governor explaining his problems with the Ms. Crumpacker's work before he felt that he could terminate Ms. Crumpacker.

There are four divisions within the KDHR: Staff Services, Workers Compensation, Employment Security and Employment & Training. The last three divisions by state law are "program" divisions; each of which provides services to the people of Kansas through programs pursuant to state or federal law. K.S.A. 75-5714, -5708, and -5705. These three divisions involve outward service delivery in the areas of unemployment compensation (K.S.A. 75-5705), workers' compensation (K.S.A. 75-5708), and Ms. Crumpacker's domain, Employment and Training (K.S.A. 75-5714.)

Ms. Crumpacker oversaw her division, setting policy particularly in developing and administering the state's Employment and Training programs in compliance with federal mandates. Ms. Crumpacker served on a national organization of the U.S. Labor Department that pieced together federal employment and training programs (ICESA). As director of employment and training there were a myriad of federal and state programs under Ms. Crumpacker's oversight.

Ms. Crumpacker also oversaw 23 Job Service Centers throughout the state, and a central administrative office in Topeka. She also oversaw the Kansas Advisory Commission on Hispanic Affairs. Ms. Crumpacker oversaw "a litany of federally funded employment and training programs" that were under her responsibility.

A very large portion of Ms. Crumpacker's job as a division director involved running the Kansas Workforce Investment

Program (KWIP). Ms. Crumpacker received a certificate of appointment from the Governor to the KWIP Council shortly after she was appointed to the Division of Employment and Training for KDHR.

The duties of the KWIP are specifically and expressly established by Executive Order of the Governor to: [a] advise the governor; and [b] assist the governor and state agencies in the development of coordinated programs among public and private employment and training service providers; and [c] formulate and advocate plans, programs, and policies to serve the needs of the Kansas work force, in cooperation with the governor.

KWIP is an advisory council to the Governor, mandated by federal law to advise the Governor on the administration of federal funds and programs administered through the Division of Employment and Training.

Ms. Crumpacker's responsibilities included doing whatever was necessary to get federal funding for the One-Stop federal program, which was affiliated with the KWIP program.

The Division Director of Employment and Training is in charge of policymaking. There was a specific section within her division, under her direction, entitled "Program Planning and Development." Ms. Crumpacker planned, sought approval, implemented, supervised and evaluated programs involving the expenditure of millions of dollars of public funds

A broad or absent job description also demonstrates the person is in a policy-making position:

> An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

Ms. Crumpacker had no written position description. and she was not given direction by Secretary Franklin as to how to do her job.

By these facts, Ms. Crumpacker is exactly the type of high-ranking political appointee who was intended to be included within the exception of 42 U.S.C. § 2000e(f). Applying the current standard of the lower courts, however, Ms. Crumpacker's position is not considered to be at the policy making level as intended by Section 2000e(f), simply because the cabinet secretary was involved in the selection process. This is clearly not the result intended, and this Court has the opportunity to correct the standard.

CONCLUSION

This Court has before it the opportunity to correct two infringements upon the sovereign authority of the States; the application of the retaliation provisions of Title VII to the States in excess of Congress' Section 5 powers; and a judicially imposed standard as to the exclusions of 42 U.S.C. 2000e(f) which infringes on the State's Tenth and Eleventh Amendment sovereignty.

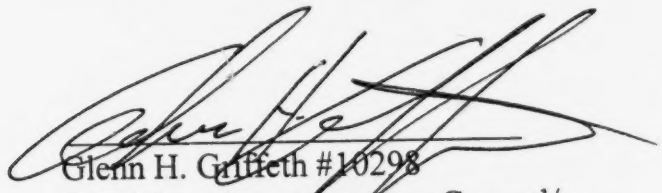
To be valid, abrogation requires that Congressional action to remedy a history and pattern of unconstitutional violations must be both congruent and proportional. That has not been shown in the extension of the retaliation provisions to the States. There is a total absence in the legislative record of any abuse by the States by way of retaliation. Indications that there was discrimination in the terms and conditions of state employment does not meet the proportional and congruent test that must be applied when examining an exercise of Congress' Section 5 powers over the State's Eleventh Amendment sovereignty. Accordingly, there has been no valid abrogation with respect to the retaliation provision of Title VII..

The decisions of the lower courts in applying a "direct" appointment test to the exclusions of 42 U.S.C. 2000e(f) without regard to whether state law defines that position as one at the policy making level, intrudes upon the State's rights under the Tenth Amendment to the United States Constitution to determine the qualifications of their own officers and officials by applying a standard that exceeds the plain language of 42 U.S.C. 2000e(f) and 42 U.S.C. 2000e-16c. If Congress did validly exercise its Section 5 powers, the current standard also infringes upon the State's Eleventh Amendment sovereignty, by broadening the class of those individuals who are not precluded by the State's Eleventh Amendment protections by their inclusion as "employee" covered by Title VII. There is a comparable remedy for those who are excluded by 42 U.S.C. 2000e(f), which avoids the Tenth and Eleventh Amendment implications, Section 2000e-16c.

The facts of this case relating to Ms. Crumpacker's position as defined by State law provide an excellent vehicle to correct these intrusions upon the Sovereignty of the States.

This case demonstrates how the application of the "direct" appointment test systematically overlooks whether the individual meets the criteria of Section 2000e(f). This Court should exercise the opportunity to correct these infringements upon the State's Tenth and Eleventh Amendment privileges and immunities.

Respectfully Submitted,



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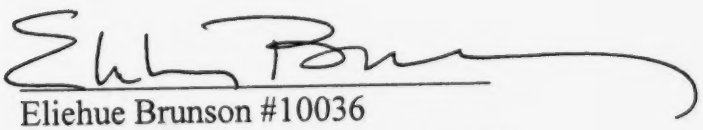

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
2002 MAY 16 P 4:58

RALPH L. DELOACH
CLERK
BY _____/S/___DEPUTY
AT TOPEKA KS

JILL M. CRUMPACKER,)
)
Plaintiff,)
vs.) Case No. 0O-4044-RDR
)
KANSAS DEPARTMENT)
OF HUMAN RESOURCES,) ENTERED ON THE
) DOCKET
Defendant) DATE: 5-17-02

MEMORANDUM AND ORDER

This is an employment discrimination action brought by the plaintiff pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Plaintiff asserts claims of sex discrimination and retaliation arising from her termination as a division director with the Kansas

Department of Human Resources (KDHR) . This matter is presently before the court upon defendant's motion for summary judgment and plaintiff's motion to strike.

I.

The court will provide a brief review of the facts to provide some background for the arguments made by the defendant. The court will provide a more detailed review of some of the facts as we address the arguments raised by the plaintiff and defendant.

Plaintiff was hired by the State of Kansas on August 1,1996 as Director of Employment and Training of the KDHR. Wayne Franklin was the Secretary of Human Resources. Plaintiff was one of four division directors at KDHR. She was the only female director. On July 20, 1998 and July 22, 1998, Secretary Franklin met with plaintiff concerning her job performance. On August 21, 1998, plaintiff responded with a letter to Secretary Franklin.

Plaintiff was terminated in September 1998.

Prior to her hiring at KDHR, plaintiff was employed at the governor's office as governmental affairs liaison and then as senior legislative liaison. She worked at the governor's office from January 1995 through August 1996. Plaintiff has a B.S. degree in chemistry and a B.A. degree in biology. She also has a master's degree in public administration from the University of Kansas and a law degree from Washburn University. She has been a licensed attorney since 1995.

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56 [c]. The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict

for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) . An issue of fact is "material" if it is essential to the proper disposition of the claim. Id. Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) . This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case. Id. at 325. Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. Anderson, 477 U.S. at 256. " ne issue for trial." Id. The mere existence of some alleged factual dispute between the

parties will not defeat an otherwise properly supported motion for summary judgment. Id. "Any evidence tending to show triable issues will be viewed in the light most favorable to the nonmoving party." Black Hills Aviation. Inc. v. United States, F.3d 968, 972 (10th Cir. 1994) (citation omitted).

III.

In its motion for summary judgment, the State of Kansas makes three arguments. First, the defendant argues that it is entitled to summary judgment on all of plaintiff's claims because plaintiff was not an "employee" within the meaning and coverage of Title VII. Second, the defendant asserts that it is entitled to summary judgment on one of plaintiff's retaliation claims because plaintiff did not engage in a protected activity as defined by Title VII. Finally, the defendant argues that it is entitled to summary judgment on plaintiff's disparate treatment claim because plaintiff has failed to sustain her burden of proof.

A.

The defendant contends that plaintiff was not an employee within the meaning of Title VII. The defendant argues that plaintiff was excluded from the definition of employee by reason of 42 U.S.C. § 2000e(f). This subsection excludes from the definition of employee the following:

> any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

The language of § 2000e{f) excludes from the definition of employee and thus from the coverage of Title VII the following four types of non-civil service state employees: (1) persons elected to public office; (2) the personal staff of elected officials; (3)persons appointed by elected officials to be on the policymaking level; and (4) the

immediate advisers of elected officials with respect to the constitutional or legal powers of the officials' offices. See Gregory v. Ashcroft, 501 U.S. 452, 481 (1991) (White, J., concurring in part and dissenting in part) (analyzing identical language of definition of employee contained in ADEA).

The focus here is upon the third exception, I. e., whether plaintiff was a person appointed by an elected official to be on the policymaking level. The defendant points out that plaintiff was an unclassified political appointee whose hiring and salary were subject to the approval of the governor. The defendant further argues that plaintiff was involved in policymaking. The defendant contends that the Supreme Court's decision in Gregory v. Ashcroft requires that this court grant summary judgment to it if Title VII does not clearly show that plaintiff is an employee entitled to its protection. Plaintiff, relying on Anderson v. City of Albuquerque 690 F.2d 796, 801 (10th

Cir. 1982), contends she was neither appointed by an elected official nor did she serve in a policymaking role.

The court must begin by considering whether plaintiff was appointed by an elected official. Plaintiff was appointed pursuant to K.S.A. 75-5702 which provides as follows:

> The secretary of human resources may appoint, with the consent of the governor, one public information officer, one or more division directors, one personal secretary and one special assistant, all of whom shall serve at the pleasure of the secretary of human resources, shall be in the unclassified service under the Kansas civil service act and shall receive annual salary fixed by the secretary of human resources with the approval of the governor. . .

Based upon this statute, the defendant argues that plaintiff was appointed by the governor, an elected official, because his consent was necessary for the appointment. Plaintiff, on the other hand, suggests that she was appointed

by the secretary of human resources, an appointed official, because he selected her for the position.

In Anderson, the staff director for the Albuquerque Human Rights Board sued the city of Albuquerque under Title VII for sex discrimination. The City contended that the plaintiff was not covered by Title VII because she was not an employee under 42 U.S.C. § 2000e(f). Plaintiff had been appointed to the position of staff director by the chief administrative officer (CAO) of the Human Rights Board. The appointment occurred after the applicants to the position were initially screened by an assistant to the CAO. They were then interviewed by the Human Rights Board, and the names of the leading candidates were sent to the CAO. The CAO had the discretion to make the selection, but he subsequently sought the mayor's approval "just to make sure

that the mayor saw in the selection the kind of compatibility that any mayor would be looking for in his administration." Based upon that record, the Tent Circuit concluded that the staff director was not appointed by an elected official within the meaning of § 2000e(f). Anderson, 690 F.2d at 801.

Following Anderson, this court decided Wanner v. State of Kansas, 766 F.Supp. 1005 (D.Kan. 1991). Neither side has discussed this case. The issues raised were similar to those raised here. There, Wanner was appointed as Assistant Director of the Division of Architectural Services by the Director of Architectural Services, an appointed position. He subsequently brought suit under ADEA, alleging that he was terminated because of his age. Wanner's position constituted unclassified service under the Kansas Civil to unclassified serviceis subject to the approval of the governor,and compensation for such appointments can not be paid until

approved by the governor. The defendant contended that Wanner was not subject to the provisions of the ADEA because he was not an employee as defined in ADEA. The defendant argued that Wanner had been appointed by an elected official. This court disagreed. We stated:"Wanner is provided coverage under the ADEA because he was not appointed to the position of Assistant Director of the Divisionof Architectural Services by an elected official." Wanner, 766 F.Supp. at 1009.

In Tranello v. Frey 962 F. 2d 244 (2nd Cir.), cert. denied, 506 U.S. 1034 (1992), a deputy county attorney brought suit against county executives under the ADEA. The deputy county attorney had been hired by the county attorney, who had been appointed by the county executive. The county executive, however, was an elected official. The district court denied summaryjudgment to the defendant on the basis of the policymaker exception. On interlocutory

appeal, the Second Circuit considered the precise issue raised by the defendant here. The court stated:

> The County also argues that while the County Attorney has the authority to appoint Deputy County Attorneys, this can be done only with the approval of the County Executive, who is an elected official. "Therefore," the County argues, "the appointment of plaintiff was by an elected official." We reject this attempt to characterize Tranello's appointment as being by an elected official as an overly strained effort to exclude Tranello from the coverage of the ADEA. "[T]he language and structure of the definition of employee' suggest that Congress meant the policymaker category to comprise only policymakers working closely with the elected official." [EEOC v. Vermont, 904 F.2d[794] at 798[(2nd Cir. 1990)]. That is why the scope of the statutory exception is limited to persons appointed by elected officials. The mere fact that the County Executive must approve the County Attorney's appointee does not convince us that the appointee would be policymaker working closely with the elected official," and does not compel the conclusion that the Deputy County Attorney is an appointee of the County Executive. We refuse to stretch the language and purpose of the exception to reach so broadly, lest the exception swallow the rule and defeat the statutory purpose.

Id. at 250. See also O' Neill v. Indiana Commission of Public Records, 149 F.Supp.2d 582,590 (S.D.Ind. 2001) (deputy director of Indiana Commission of Public Records was employee covered by Title VII where she was appointed by Director of Indiana Commission on Public Records, an official appointed by the Governor, even though Indiana laws required that appointments made by Director be approved by the governor).

This court continues to believe that we correctly decided Wanner. We are not persuaded that subsequent case law, including Gregory, requires a different result. Gregory did not directly consider this issue, and we do not believe that the language in it should be read as broadly as the defendant suggests. Accordingly, we must conclude that plaintiff can seek relief under Title VII because she is an employee under the definition set forth in 442 U.S.C. §

2000e(f). She was not appointed by an elected official to her position. The mere fact that the governor had to consent to her appointment does not compel the conclusion that she was an appointee of an elected official. With this decision, the court need not consider whether she was on a policymaking level.

B.

Plaintiff contends that she was terminated in retaliation for (1) a letter written to Secretary Franklin on August 21, 1998 complaining of gender discrimination and retaliation; and (2) reporting the improper use of a KDHR computer to visit pornographic websites. The defendant challenges plaintiff's second theory of retaliation.[1] The defendant argues that plaintiff cannot pursue this retaliation

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1. In its reply brief, the defendant makes a variety of arguments concerning plaintiff's retaliation theory based on the August 21st letter. The defendant also suggests that plaintiff cannot pursue this retaliation claim. The court does not intend to consider this issue because the defendant failed to raise it in its initial brief.

claim because she did not engage in protected activity as defined by Title VII. The defendant argues that plaintiff's report concerning the computer incident was not a reasonable good faith opposition to gender based discrimination or sexual harassment made unlawful under Title VII.

The facts underlying this claim are as follows: On June 19, 1998, one of plaintiff's subordinates was performing a routine maintenance check on one of the KDHR's laptop computers. During the course of the maintenance check, the employee discovered that over 800 inappropriate Internet sites, mostly pornographic websites, had been visited using the laptop. The dates of these visits occurred in July and August 1997 when it was checked out to A. J. Kotich, legal counsel for KDHR. Plaintiff reported the "computer incident" to Secretary Franklin. She claims that thereafter she was retaliated against and subsequently terminated.

Title VII establishes two categories of protected activity: Participation and opposition. See 42 U.S.C. §2000e-

3(a) (prohibiting retaliation because an employee "has opposed any practice made an unlawful emploYment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII"]). Here, plaintiff has asserted an opposition claim.

In Shiwari v. Raytheon Aircraft Co., 215 F.3d 1337, 2000 WL 731782 at ** 5(10th Cir. 2000) (table decision), cert. denied, 531 F.3d 1104 (2001), the Tenth Circuit reiterated that the standard in this circuit requires only that the employee have a "subjective good faith" belief that Title VII has been violated. Contrary to the law in the Eleventh Circuit and in accord with the First Circuit, the Tenth Circuit does not require that the opposition activity be objectively reasonable. Id. Thus, the only question in determining whether plaintiff's complaints of discrimination constituted

protected opposition is whether those complaints were made in good faith. Id.

The validity of Shiwari is somewhat questionable given the Supreme Court's subsequent decision in Clark County School District v. Breeden, 532 U.S. 268 (2001) (per curiam). In Clark County, the plaintiff argued that she was retaliated against for complaining to her supervisors about an incident that had taken place between her and her supervisor. During a meeting, plaintiff's supervisor read aloud a sexually explicit comment from an applicant's psychological evaluation report. Plaintiff's male supervisor looked at plaintiff, and stated, "I don't know what that means." Another employee replied, "Well, I'll tell you later," and both men chuckled. Plaintiff complained about the comment to the offending supervisor and other officials of defendant school district. She subsequently filed a Title VII retaliation claim, asserting that she was punished for these complaints. The

district court granted summary judgment to the school district, but the Ninth Circuit reversed. The Supreme Court reversed the Ninth Circuit's holding that a genuine issue of fact existed as to whether plaintiff had engaged in protected activity by complaining to her employer about the incident. Relying upon its holdings in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998) that "sexual harassment is actionable under Title VII only if it is 'so severe or pervasive as to alter the of [the victim's] employment and create an abusive working environment,'" the Court reasoned:

> The Court of Appeals for the Ninth Circuit has applied § 2000e-3(a) to protect employee "oppos[ition]" not just to practices that are actually "made . . .unlawful" by Title VII, but also to practices that the employee could reasonably believe were unlawful. 2000 WL 991821, at *1 (stating that respondent's opposition was protected "if she had a reasonable, good faith belief that the incident involving the sexually explicit remark

> constituted unlawful sexual harassment") ; Trent v. Valley Electric Assn., Inc., 41 F.3d 524, 526 (CA9 1994). We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII. 532 U.S. at 270.

The Clark Court had the opportunity to clarify whether an objective or subjective standard or both should be applied in determining whether the subject matter of an employee's complaint should receive protection under the opposition clause. The Court, however, failed to take this opportunity to resolve the split that exists among the Circuits. Nevertheless, the Court strongly implied that if the standard applicable to determining whether opposition activity is protected under the anti-retaliation clause of Title VII is the reasonableness of the plaintiff's belief that a supervisor's conduct was unlawful, that standard must be applied with an

eye on precedent. While not specifically endorsing the objective standard of a plaintiff's belief, the Court's lengthy discussion of the threshold of severity and pervasiveness required before sexual harassment becomes actionable suggests that more may be required of a plaintiff than a mere showing that the average worker would perceive the complained of conduct as unlawful.

Having carefully reviewed the record, the court is persuaded that plaintiff, with her background and education, could not have reasonably believed that the computer misuse incident violated Title VII. The law is well-settled that the display of pornographic materials can create a hostile work environment under Title VII. Nevertheless, this well-established proposition cannot provide support for the plaintiff's contention that the mere presence of data on a computer that pornographic websites have been visited can

create a sexually harassing hostile work environment under Title VII. Plaintiff has provided no case law to support such a rule, and we cannot find any either. Here, plaintiff had no information that any of the pornography had ever been displayed to anyone. She had not seen any of it, and she was unaware that it had been displayed to any other employee. Under such circumstances, we do not believe that plaintiff could reasonably believe that Title VII had been violated. Accordingly, the court finds that the defendant is entitled to summary judgment on this aspect of the summary judgment claim.

C.

The defendant contends that plaintiff has failed to establish a claim of disparate treatment.[2] The defendant

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2. The defendant initially also argued that plaintiff had failed to demonstrate a claim of sexual harassment under Title VII. Plaintiff responded that she was not making such a claim. with plaintiff's admission, the court need not consider the arguments

argues that plaintiff has not sufficiently demonstrated that she was terminated because of her sex.

Title VII prohibits employers from discriminating with respect to "terms, conditions, or privileges of employment," on account ofan individual's race, color, religion, sex or national origin. §42 U.S.C. 2000e 2 (a) (1). The standards for determining such claims are well-established. To prevail on her Title VII claim, plaintiff "must prove. . . that [the defendant] had a discriminatory motive or intent." Ortega v. Safeway stores, Inc., 943 F.2d 1230, 1236 (10th Cir. 1991). She must demonstrate that her sex was the motivation for her termination. See E. E .0. C. v. Flasher Co., Inc., 986 F.2d 1312, 1319 (10th Cir. 1992) (essence of a disparate treatment claim is intentional discrimination based upon a protected classification).

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raised by the defendant on this issue.

Absent direct evidence, plaintiff may use an indirect method to prove discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Plaintiff has the initial burden of proving her prima facie case of discrimination. Id. The burden then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for [its conduct]." Id. If the defendant carries this burden, it shifts back to the plaintiff to prove that the reasons proffered "by the defendant were not [its] true reasons, but were pretexts for discrimination." Id. Despite the framework of shifting burdens, the ultimate burden of persuasion resides at all times with the plaintiff. Id.

The defendant initially argues that plaintiff cannot demonstrate a prima facie case of discrimination because she was replaced by a woman. We must disagree. A plaintiff need not show that the person hired to replace her was outside her protected class. English v. Colorado Dept. of

Corrections, 248 F.3d 1002, 1008 (10th Cir. 2001). Accordingly, the court finds that the plaintiff has sufficiently demonstrated a prima facie case of discrimination.

With the finding that plaintiff has sufficiently demonstrated a prima facie case of discrimination, we turn to the other burdens of the McDonnell Douglas framework. The defendant asserts that it has identified a legitimate, non-discriminatory reason for terminating the plaintiff, i.e., poor performance and inability to get along with others. We agree with the defendant. Next, we must consider if plaintiff has put forth sufficient evidence to find that the defendant's reason is pretextual.

The court has conducted an exhaustive review of the materials presented to the court. Both sides have marshaled a wealth of evidence in support of their positions. After a careful review, the court has determined that summary judgment cannot be granted to the defendant on plaintiff's

claim of discriminatory discharge. While the evidence of discrimination based on gender presented byplaintiff is hardly overwhelming, we do believe that it is sufficient to avoid summary judgment. The court believes that the evidence must be considered by a jury. Accordingly, defendant's motion for summary judgment on this aspect of the case shall be denied.

IV.

Plaintiff seeks to strike certain portions of the affidavit submitted by Wayne L. Franklin. She contends that it fails to comply with Fed.R.Civ.P. 56(e) because it contains hearsay and attempts to set forth facts that would be inadmissible at trial. Specifically, plaintiff seeks to strike statements that are attributed to Governor Graves. The defendant argues that the statements noted by the plaintiff are not hearsay. The defendant asserts that the statements either indicate what Secretary Franklin heard or the motivation for

his actions. The court is not persuaded that the portions noted by the plaintiff need to be stricken. The court has not considered these statements for the truth of the matter asserted. Rather, the court has considered them as providing the motivation for Secretary Franklin's actions. Accordingly, plaintiff's motion to strike shall be denied.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment (Doc. # 127) be hereby granted in part and denied in part as set forth in the foregoing memorandum and order.

IT IS FURTHER ORDERED that plaintiff's motion to strike (Doc.# 132) be hereby denied.

IT IS SO ORDERED.

Dated this 16th day of May, 2002 at Topeka, Kansas.

/s/
Richard D. Rogers
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
AUG 8 2003

PATRICK FISHER
Clerk

JILL M. CRUMPACKER

Plaintiff-Appellee,

v. No. 02-3197

STATE OF KANSAS, DEPARTMENT OF HUMAN RESOURCES,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Kansas
(D. C. No. 00-CV-4044-RDR)

Deborah J. Blakely, White, Allinder, Graham & Buckley, L.L.C., Independence, Missouri (Gene P. Graham, Jr., Mary Beth Compton, White, Allinder, Graham & Buckley, L.L.C., Independence, Missouri; Timothy W. Monsees, Monsees, Miller, Mayer, Presley & Amick, Kansas City, Missouri, on the brief), for Plaintiff-Appellee.

Deanne Watts Hay (Stanley R. Parker, with her on the briefs), Parker & Hay, L.L.P., Topeka, Kansas for the Defendant-Appellant.

Before **MURPHY, BALDOCK**, and **HARTZ**, Circuit Judges.

I. INTRODUCTION

Plaintiff, Jill Crumpacker, filed this suit against her former employer, the State of Kansas (the "State"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17, alleging gender discrimination and retaliation. The State moved for summary judgment, arguing, in part, that it was immune from suit under the Eleventh Amendment. The district court granted the State's motion as to one of Crumpacker's retaliation claims and denied the State's motion as to the remaining claims. The State filed an interlocutory appeal of the Eleventh Amendment immunity issue and other issues raised in its motion for summary judgment.

This court has jurisdiction over the Eleventh Amendment immunity issue and exercises pendent jurisdiction over the issue of whether a retaliation claim can be maintained when the plaintiff has only a subjective good-faith belief that the underlying conduct violated Title VII. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1200 (10th Cir. 2002). This court **affirms** the district court's denial of the State's motion for summary judgment, concluding that Congress properly abrogated the states' Eleventh Amendment immunity from Title VII retaliation claims predicated on a reasonable good-faith belief that the complained of activity violated Title VII.

II. BACKGROUND

From August 1996 through September 1998, Crumpacker was employed as the Director of Employment and Training of the Kansas Department of Human Resources. On August 21, 1998, Crumpacker wrote a thirteen-page letter to the Kansas Secretary of Human Resources, Wayne Franklin, (the "Franklin letter") in response to two meetings she had with Franklin regarding her job performance. In this letter, Crumpacker complained of the way she was being treated at work and made reference to her gender twice. She stated, "As your only female division director, I have worked exceedingly hard during the past two years to 'fit in with the guys.'" Crumpacker further stated:

With respect to the meetings of July 20 and 22, 1998, and your letter of July 22, 1998, the statements that I am or have ever acted to undermine either Roger Aeschliman or A.J. Kotich are untrue. What is true is that both Roger and A.J. appear to have difficulty treating me as an equal Executive Team member, either for personal reasons or because I am a woman.

In September 1998, Crumpacker was terminated. Following her termination, Crumpacker filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and received a right to sue letter. Subsequently, Crumpacker brought this suit against the State alleging claims of gender discrimination and retaliation.

The State moved for summary judgment on the grounds that: (1) Crumpacker was not an "employee" under Title VII and (2) Crumpacker failed to show that she engaged in activity protected under Title VII for which she was terminated or otherwise disciplined. At the hearing on the motion, the State argued that it was entitled to summary judgment on the grounds that Crumpacker's claims were barred by the Eleventh

Amendment. Because the State did not raise the issue of Eleventh Amendment immunity in its initial brief on its motion for summary judgment, the district court permitted the State and Crumpacker to file supplemental briefs on the issue. At the conclusion of the hearing, the district court informed the parties that it would consider the issue of Eleventh Amendment immunity prior to ruling on the motion.

Without discussing the issue of Eleventh Amendment immunity, the district court denied the State's motion with respect to Crumpacker's gender discrimination claims, concluding Crumpacker was an "employee" under Title VII and that a genuine issue of material fact existed concerning whether the State discriminated against Crumpacker on the basis of gender. The district court also denied summary judgment on Crumpacker's retaliation claim pertaining to her termination after writing the Franklin letter,[1] reasoning that the State waived its arguments on the merits of Crumpacker's claim by failing to assert them in the initial brief.[2]

On appeal, the State argues, *inter alia*, that the Eleventh Amendment bars Crumpacker's suit because: (1) Congress did not abrogate the states' sovereign immunity from Title VII retaliation claims and (2) even if Congress abrogated the states' sovereign immunity from such claims, it did not do so for retaliation claims based solely on a plaintiff's subjective good-faith belief that the complained of activity is prohibited under Title VII.

II. DISCUSSION

A. Interlocutory Appellate Jurisdiction

While this court typically has jurisdiction only over final decisions of the district court, it may consider appeals of interlocutory orders falling within the collateral order doctrine.

Stewart v. Oklahoma, 292 F.3d 1257, 1259 (10th Cir. 2002). Under the collateral order doctrine, an otherwise interlocutory order may be reviewed if it "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Puerto Rico Aqueduct*, 506 U.S. at 143 (quotation omitted); *Timpanogos Tribe*, 286 F.3d at 1999. The Supreme Court has held that the denial of a state's claim to Eleventh Amendment immunity falls within the collateral order doctrine. *Puerto Rico Aqueduct*, 506 U.S. at 147. Therefore, the district court's denial of the State's claim to Eleventh Amendment immunity is immediately appealable.[3]

In addition to the Eleventh Amendment immunity issue, the State appeals other various issues raised in its motion for summary judgment, including: (1) whether Crumpacker is an "employee" under Title VII[4]; (2) whether a plaintiff may maintain a retaliation claim based on a purely subjective good-faith belief that the complained of activity violated Title VII; and (3) whether Crumpacker presented sufficient evidence to support her retaliation claim. The district court's resolution of these issues, however, does not decide questions separate from the merits, and is neither conclusive nor effectively unreviewable on appeal from final judgment. *Timpanogos Tribe*, 286 F.3d at 1200. Therefore, these issues do not warrant an interlocutory appeal in their own right.

This court, however, may exercise pendent appellate jurisdiction over otherwise nonappealable decisions that are "inextricably intertwined with the appealable decision" or require review to provide a meaningful analysis of the appealable decision. *Id.* (quotation omitted). On appeal, the State argues that the states' Eleventh Amendment immunity has

not been abrogated for Title VII retaliation claims based only on the plaintiff's subjective good-faith belief that the complained of conduct violated Title VII. In order to resolve the appealable Eleventh Amendment claim, this court must address whether a Title VII retaliation claim may be maintained on the plaintiff's subjective good-faith belief alone. Therefore, the determination of whether a Title VII retaliation claim may be maintained on a subject good-faith belief is inextricably intertwined with the appealable Eleventh Amendment claim and review of this issue is necessary to analyze the State's Eleventh Amendment claim in a meaningful way. *See Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995) (holding that a claim is "inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal").

In sum, this court has appellate jurisdiction over the interlocutory appeal of the State's claim of Eleventh Amendment immunity. Moreover, this court exercises pendent appellate jurisdiction to determine whether a plaintiff may maintain a retaliation claim based on a subjective good-faith belief that the complained of conduct violated Title VII.

B. Eleventh Amendment Immunity

This court reviews *de novo* the district court's denial of a state's claim to Eleventh Amendment immunity. *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 975 (10th Cir. 2001); *Stewart*, 292 F.3d at 1260.

The Eleventh Amendment guarantees "that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). Congress, however, may abrogate Eleventh Amendment immunity "when it both unequivocally intends to do so and

act[s] pursuant to a valid grant of constitutional authority." *Id.* (quotation omitted). Congress' power to abrogate the states' Eleventh Amendment immunity arises under § 5 of the Fourteenth Amendment. *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1976 (2003). In exercising its authority under § 5, Congress may "do more than simply proscribe conduct that [has been] held unconstitutional." *Id.* at 1977. Congress' authority extends to providing remedies and to deterring violations of rights guaranteed by the Fourteenth Amendment "by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.* (quotation omitted). Therefore, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Id.*

In *Fitzpatrick v. Bitzer*, the Supreme Court held that Congress, by amending Title VII in 1972 to include state and local governments as "employers," expressed a clear intention to abrogate the states' Eleventh Amendment immunity. 427 U.S. 445, 449 n.2 (1976). The State argues, however, that the Court has not resolved whether Congress acted within its § 5 authority when it enacted the Title VII retaliation provisions and that the enactment of the retaliation provisions was an improper exercise of Congressional authority.

Legislation properly enacted under § 5 may not "attempt to substantively redefine the States' legal obligations." *Hibbs*, 123 S. Ct. at 1977 (quotation omitted). Moreover, such "legislation must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 1978 (quotation omitted). In examining whether legislation is congruent and proportional, the courts consider "whether Congress had evidence of a pattern of constitutional violations on the part of the States." *Id.*

In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court analyzed whether Congress acted within its authorized § 5 power when it abrogated the states' Eleventh Amendment immunity through the Family Medical Leave Act's ("FMLA") family-leave provision. *Id.* at 1977. In determining whether the family-leave provision exhibited congruence and proportionality, the *Hibbs* Court focused on the principle that gender-based classifications are subjected to heightened scrutiny. *Id.* at 1978. The Court reasoned that "[b]ecause the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it [is] easier for Congress to show a pattern of state constitutional violations." *Id.* at 1982.

The legislative record before Congress when it enacted the 1972 amendments to Title VII indicates that Congress identified a pattern of employment discrimination based on gender by the states. In enacting the 1972 amendments to Title VII, Congress noted that "discrimination against minorities and women continue[d]" after the passage of the Civil Rights Act of 1964. H.R. Rep. No. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2139. Congress relied on several studies showing that women were employed in "less challenging, . . . less responsible and . . . less remunerative positions on the basis of their sex alone," and statistical data demonstrating that women were economically disadvantaged as a class to conclude that women workers suffered from discriminatory treatment. *Id.* at 2140-41. Moreover, Congress was apprised of the problems of gender discrimination on the part of states through its consideration of the Equal Rights Amendment and the Educational Opportunity Act. *See Okruhlik v. Univ. of Ark.*, 255 F.3d 615, 625 (8th Cir. 2001) (noting that Congress "held extensive hearings and received numerous reports detailing racial and gender discrimination by the states which were relevant" to the 1972 amendments to Title VII, the Equal Rights Amendment, and the

Education Opportunity Act). Therefore, the legislative record demonstrates an identified history and pattern of unconstitutional gender-based employment discrimination by the states. *Nanda v. Bd. of Trs. of the Univ. of Ill.*, 303 F.3d 817, 830-31 (7th Cir. 2002) (holding that Congress identified a history and pattern of unconstitutional employment discrimination on the basis of gender by the states); *Okruhlik*, 255 F.3d at 625 (same).

The State argues that, while Congress may have identified a pattern of unconstitutional gender discrimination by the states, it failed to identify a pattern of retaliatory conduct by the states. This court, however, need not "pars[e] the legislative findings with regard to Title VII" as finely as the State suggests. *Warren v. Prejean*, 301 F.3d 893, 899 (8th Cir. 2002). Lack of evidence in the legislative history of particular instances of retaliatory conduct is not dispositive of whether Congress properly exercised its authority under § 5 in enacting the retaliation provision of Title VII. *Id.* To properly enact legislation under its § 5 authority, Congress need not identify a pattern of each *form* of gender discrimination in the workplace by the states. *Cf. Garrett*, 531 U.S. at 368. Rather, Congress need only identify a history and pattern of unconstitutional behavior on the part of states. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645-46 (1999). Here, Congress clearly identified a pattern of unconstitutional employment discrimination on the basis of gender by the states.

In addition to identifying such a pattern of unconstitutional discrimination, Congress also identified the lack of an "effective forum to assure equal employment" for state employees. H.R. Rep. No. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152-53. By enacting the retaliation provision, Congress ensured that state employees could utilize the protections of Title VII by reporting instances of discrimination without the

fear of retaliatory conduct. Given the evidence of gender discrimination by the states and Congress' recognition that state employees did not have an "effective forum to assure equal employment," Congress acted within its § 5 authority to enact necessary prophylactic legislation to remedy the identified pattern of gender discrimination. The retaliation provision of Title VII is, therefore, congruent and proportional to the identified constitutional injury to be remedied. Because Congress identified a pattern and history of gender discrimination by the states and because the retaliation provision is congruent and proportional to this identified constitutional injury, Congress properly exercised its § 5 authority in enacting the retaliation provision of Title VII.

The State, however, goes on to argue that, even assuming Congress properly abrogated the states' Eleventh Amendment immunity from the retaliation claims under Title VII, it did so only with respect to those claims which are based on actual violations of Title VII. Therefore, the State argues, to the extent Crumpacker's retaliation claim is based only on her subjective good-faith belief that the underlying conduct violated Title VII, the State is immune from suit.

To address the State's argument, this court must first decide whether a plaintiff may maintain a retaliation claim based on a subjective good-faith belief that the challenged conduct violated Title VII. In *Love v. RE/MAX of Am., Inc.*, this court held that a plaintiff can maintain a retaliation claim "based on a mistaken good faith belief that Title VII has been violated." 738 F.2d 383, 385 (10th Cir. 1984). Subsequently, in *Jeffries v. Kansas*, this court held that "a plaintiff may maintain an action for retaliation based on participation in a protected proceeding regardless of whether the conduct forming the basis of her underlying complaint is adjudged to violate Title VII." 147 F.3d 1220, 1231 (10th Cir. 1998). The *Jeffries* court also cited with

approval the First Circuit's interpretation of the participation clause of Title VII as not "requiring that the charges be valid, nor even . . . implied[ly] requir[ing] that they be reasonable." *Id.* (quotation omitted). In a recent unpublished disposition, this court has suggested that *Jeffries* allows plaintiffs to maintain retaliation claims premised on statutory opposition conduct which in turn are based on an unreasonable good-faith belief that Title VII was violated. *Shinwari v. Raytheon Aircraft Co.*, No. 98-3324, 2000 WL 731782, at *5 (10th Cir. June 8, 2000). Under an expansive reading of *Jeffries*, plaintiffs may maintain retaliation claims based on an unreasonable subjective good-faith belief that the opposed conduct violated Title VII.

The Supreme Court, however, recently rejected by implication any interpretation of Title VII that would permit plaintiffs to maintain retaliation claims based on an unreasonable good-faith belief that the underlying conduct violated Title VII. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001). In *Clark*, the Supreme Court reversed the Ninth Circuit and upheld the dismissal of an employee's retaliation claim, concluding that "no one could reasonably believe that the incident violated Title VII." *Id.* Under the Ninth Circuit's interpretation of Title VII, a plaintiff could state a retaliation claim based on a reasonable good-faith belief that the underlying conduct violated Title VII. *Id.* While the *Clark* Court did not address the propriety of the Ninth Circuit's interpretation of the Title VII retaliation provision, the Court did implicitly reject any interpretation of Title VII which would permit a plaintiff to maintain a retaliation claim based on an *unreasonable* good-faith belief that the underlying conduct violated Title VII. *Id.* Accordingly, the Supreme Court's decision in *Clark* supercedes and overrules this court's prior decisions, to the extent they interpreted Title VII as permitting retaliation claims based on an *unreasonable* good-faith belief that the underlying conduct violated Title VII. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (holding that

a decision of a panel of this court may not be reversed absent *en banc* reconsideration or a superseding Supreme Court decision).[5]

Finally, the State argues that Congress' authority under § 5 is limited to remedying *actual* constitutional violations. Therefore, the State argues, Congress did not properly abrogate the states' Eleventh Amendment immunity for retaliation claims based only on a reasonable good-faith belief that the underlying conduct violated Title VII. The Supreme Court, however, has held that Congress is authorized to enact prophylactic § 5 legislation designed to remedy and deter discrimination. *Hibbs*, 123 S. Ct. at 1979. Further, the Court has rejected the proposition that Congress' authority under § 5 is limited to proscribing actual discrimination. *Id.* at 1983. By permitting plaintiffs to maintain retaliation claims based on a reasonable good-faith belief that the underlying conduct violated Title VII, employees are able to report what they reasonably believe is discriminatory conduct without fear of reprisal. Strong policy supports allowing plaintiffs to maintain such claims. *Robben v. Runyon*, No. 98-3177, 2000 WL 123421, at *5 (10th Cir. Feb. 1, 2000) (Murphy, J., concurring). The determination of what constitutes prohibited conduct under Title VII continually evolves as "courts continue to struggle with the question of the types of workplace discrimination and harassment which are prohibited by Title VII." *Id.* If plaintiffs are not protected from retaliation when they challenge conduct that they have a reasonable good-faith belief is prohibited by Title VII, "the incentives for asserting otherwise valid claims at the margins of Title VII are drastically reduced, if not eradicated." *Id.* Therefore, Congress is authorized to enact such prophylactic § 5 legislation to deter gender discrimination in the workplace and that authorization extends to the prohibition of retaliation even when the underlying conduct may not constitute a violation of Title VII.

IV. CONCLUSION

For the reasons stated above, this court **AFFIRMS** the district court's denial of the State's claim to Eleventh Amendment immunity.

FOOTNOTES

[1] Crumpacker's retaliation claim is premised on opposition conduct. *See* 42 U.S.C. § 2000e-3(a) (designating as an unlawful employment practice discrimination against an individual "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter").

[2] The district court granted the State summary judgment on Crumpacker's retaliation claim premised on a complaint she made to the State regarding inappropriate computer usage by a co-worker, reasoning that Crumpacker did not have a subjective good-faith belief that the complained of conduct violated Title VII. This ruling is not at issue on appeal.

[3] The district court did not expressly rule on the Eleventh Amendment issue in its order partially denying the State's motion for summary judgment. While the State failed to raise Eleventh Amendment immunity in its briefs in support of its motion, the State raised this issue at the motion hearing. Further, the district court provided the parties with an opportunity to submit supplemental briefs and indicated that it would consider the issue in ruling on the State's motion. Because the issue of Eleventh Amendment immunity was properly raised, this court has jurisdiction to consider the issue

in this appeal. *Stewart v. Oklahoma*, 292 F.3d 1257, 1260 (10th Cir. 2002) (holding that the district court's failure to address the issue of Eleventh Amendment immunity is an implicit denial of the defendant state's claim to Eleventh Amendment immunity).

[4] The State argues that the determination of whether Crumpacker is an "employee" under Title VII involves an issue of Eleventh Amendment immunity. Specifically, the State argues that because it is ambiguous whether she is an "employee," the Eleventh Amendment bars her suit. The only support the State provides for this argument is the Supreme Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991). In *Gregory*, Missouri state court judges brought claims under the Age Discrimination in Employment Act of 1967 ("ADEA") challenging a provision of the Missouri Constitution which mandated retirement of state judges at the age of seventy years. *Id.* at 455. The Court noted that decisions regarding the qualification and regulation of state judges are typically within the control of the states and that such "decision[s] [are] of the most fundamental sort for a sovereign entity." *Id.* at 460. The Court reasoned that because "[c]ongressional interference with [such] decision[s] . . . would upset the usual constitutional balance of federal and state powers," Congress "should make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Id.* at 460-61 (quotation omitted). The aspect of sovereignty at issue in *Gregory* was the states' ability to determine the qualifications of state judges. *Id.* The *Gregory* court reasoned that by determining whether state judges as a class were "employees" under the ADEA, it "may avoid a potential constitutional problem." *Id.* at 464. In this interlocutory appeal where the State raises only an Eleventh Amendment challenge, the aspect of sovereignty at issue is the states' *immunity from suit* in federal court. This context is wholly different from that in *Gregory*. The issue of congressional intent has already been decided by the Supreme

Court in an Eleventh Amendment context. In *Fitzpatrick v. Bitzer*, the Court held that Congress clearly expressed an intent to abrogate the states' Eleventh Amendment immunity from Title VII claims. 427 U.S. 445, 449 n.2 (1976). Therefore, unlike the Court in *Gregory*, this court need not address the issue of whether Crumpacker is an "employee" under Title VII in an attempt to avoid a "potential constitutional problem." *Gregory*, 501 U.S. at 464.

[5] The State argues that it is ambiguous whether, under Title VII, a retaliation claim may be based on challenged conduct which does not actually violate Title VII. Further, the State argues that such ambiguity entitles the State to Eleventh Amendment immunity. This court, however, has held that an *actual violation* is not required to maintain a retaliation claim under Title VII. *See Love v. RE/MAX of Am., Inc.*, 738 F.3d 383, 385 (10th Cir. 1984). Accordingly, because there is no ambiguity regarding this issue, the State's argument lacks merit.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JILL M. CRUMPACKER, Plaintiff - Appellee, v. STATE OF KANSAS, DEPARTMENT OF HUMAN RESOURCES, Defendant - Appellant.	No. No. 02-3197

ORDER

Filed September 8, 2003

Before **MURPHY, BALDOCK,** and **HARTZ,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active

service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk